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Practising Law Institute  
 Tax Law and Estate Planning Course Handbook Series  
 Tax Law and Practice  
 PLI Order No. 11569  
 October-November, 2007

Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations  
 & Restructurings 2007

**\*385 FIDUCIARY LITIGATION UNDER ERISA**

Robert N. Eccles  
 Gary S. Tell  
 Karen M. Wahle  
 O'Melveny & Myers LLP

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*D. Liability of Non-Fiduciaries***\*389 I. FIDUCIARY STATUS: WHO IS A FIDUCIARY****A. The Statutory Provision**

ERISA § 3(21)(A) provides that, except in the case of an investment company described in § 3(21)(B), a person is a plan fiduciary “to the extent” he (i) exercises discretionary authority or control over plan management or any authority or control over management or disposition of plan assets, (ii) renders investment advice regarding plan assets for a fee or other compensation or has authority or responsibility to do so, or (iii) has any discretionary authority or responsibility in plan administration.

**B. Fiduciary Positions**

An early Department of Labor (“DOL”) regulation states that certain positions, such as plan trustee or plan administrator, “by their very nature” carry fiduciary status. 29 C.F.R. § 2509.75-8 at D-3. Some courts find fiduciary status simply from occupancy of one of these positions (which is merely a shorthand version of the functional test, described below, i.e., some positions inherently carry the authority to perform fiduciary functions). See Bouboulis v. Transp. Workers Union of Am., 442 F.3d 55 (2d Cir. 2006) (concluded that local union, as the named plan administrator, was a fiduciary even though it performed only ministerial functions; “The formal title of ‘Plan Administrator’ has special significance under ERISA.”); NLRB v. Amax Coal Co., Div. of Amax, Inc., 453 U.S. 322 (1981) (Congress intended Taft Hartley plan trustees to be fiduciaries and not representatives of bargaining parties); Donovan v. Mercer, 747 F.2d 304, 309 (5th Cir. 1984) (citing DOL regulation); Chao v. Docster, Inc., 2006 WL 1593521 (N.D.N.Y. 2006) (named fiduciary of the corporate 401k plan is a fiduciary, even if he had no personal involvement in plan administration); Narda, Inc. v. Rhode Island Hosp. Trust Nat'l Bank, 744 F. Supp. 685 (D. Md. 1990); Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 635 (W.D. Wis. 1979) (same).

Certain positions are, without question, defined as fiduciary positions under the statute. For example, under § 402(a), a “named fiduciary” must be appointed with overall fiduciary responsibility for the plan. See 29 C.F.R. § 2509.75-5 at FR-3; see also In re ESCO Mfg. Co., 50 F.3d 315 (5th Cir. 1994) (discussing requirement); Confer v. Custom Eng'g Co., 952 F.2d 34, 36 (3d Cir. 1991) (same); Yeseta v. Baima, 837 F.2d 380, 384 (9th Cir. 1988); Birmingham v. SoGen Swiss Int'l Corp. Retirement Plan, 718 F.2d 515, 521-22 (2d Cir. 1983); Arakelian v. National Western Life Ins. Co., 680 F. Supp. 400, 404 (D.D.C. 1987). However, ERISA also permits a plan document to name a fiduciary who has that status only for a particular function. See 29 C.F.R. § 75-8 at D-4; Daniels v. National Employee Benefit Servs., Inc., 858 F. Supp. 684, 690 (N.D. Ohio 1994); but see Arakelian v. National Western Life Ins. Co., 680 F. Supp. 400, 404 (D.D.C. 1987) (in case involving only one named fiduciary, court stated that a named fiduciary is fiduciary for all purposes). An “investment manager” must, under § 3(38), acknowledge fiduciary status. Lowen v. Tower Asset Mgmt., 829 F.2d 1209, 1218 (2d Cir. 1987). See also \*390 Kenny v. Quigg, 820 F.2d 665 (4th Cir. 1987) (bank appointed as fiduciary under consent order is subject to judicial review of its compliance with ERISA's fiduciary obligations).

**C. Fiduciary Functions**

More frequently, courts have described the test of determining fiduciary status as a “functional” one, i.e., does the person or firm have or exercise any of the functions described in § 3(21)(A). A number of courts have emphasized the broad sweep of this functional definition. Beddall v. State Street Bank & Trust Co., 137 F.3d 12 (1st Cir. 1998) (“the statute also extends fiduciary liability to functional fiduciaries”); Olson v. E.F. Hutton &